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No. 75-331

In the Supreme Court of the United States

OCTOBER TERM, 1975

GENEVA RUFFIN, DELORES GATES, ELAINE PORTER, and BETTY RODGERS,

Petitioners,

vs.

MERCURY RECORD PRODUCTIONS, INC., and MERCURY RECORD CORPORATION,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

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vs.

MERCURY RECORD PRODUCTIONS, INC., and MERCURY RECORD CORPORATION,

Respondents.

BRIEF OF RESPONDENTS MERCURY RECORD PRODUCTIONS, INC. AND MERCURY RECORD CORPORATION IN OPPOSITION TO CERTIORARI

Respondents Mercury Record Productions, Inc. and Mercury Record Corporation respectfully submit that the Petition for Writ of Certiorari filed by Geneva Ruffin, Delores Gates, Elaine Porter, and Betty Rodgers is without merit and should be denied.

Questions Presented

Contrary to the statement of the "Questions Presented" framed by the petition (p. 2), the only question presented is:

Whether, under the authority of Rule 50(b) of the Federal Rules of Civil Procedure, the determination by both the trial court and the Court of Appeals for the Sixth Circuit that the evidence was insufficient, as a matter of law, to submit the case for the jury's determination, was violative of petitioners' rights under the Seventh Amendment?

Petitioners present neither a novel nor important question of Constitutional dimension.

Statement of the Case

Petitioners' statement of the case is misleading and incomplete in one important respect. They claim that no specific finding was made by the trial judge indicating a lack of consideration to support the post-contract promises. However, aside from the three specific reasons given by the trial court for the entry of judgment notwithstanding the verdict, the trial court also stated as follows:

> "... there was no legally sufficient evidence for the jury to find that the alleged oral statements relating to substantial road travel and substantial advertising and promotion imposed a contractual obligation on the defendants."

Although petitioners claim in their brief that the record discloses "substantial evidence" that post-contract promises were supported by consideration, no such evidence exists. Petitioners have not referred to any portion of the record to support this wholly gratuitous statement.

Reasons For Denying The Writ

I.

THE ENTRY OF JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO RULE 50(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT CONSTITUTE A DEPRIVATION OF ANY RIGHTS UNDER THE SEVENTH AMENDMENT.

Petitioners have attempted to obscure firmly rooted and very basic modes of trial procedure under the guise of "constitutional principles" by asserting that the granting of judgment notwithstanding the verdict in the instant case was a deprivation of rights under the Seventh Amendment.

No longer can there be any doubt, however, that Rule 50(b) of the Federal Rules of Civil Procedure is entirely consistent with and not an infringement of Seventh Amendment guarantees. The constitutionality of the Rule is thoroughly settled. In *Neely* v. *Martin K. Eby Construction Co.*, 87 S. Ct. 1072, 386 U.S. 317, 18 L.Ed. 75 (1967) reh. denied 87 S. Ct. 1366, 386 U.S. 1027, 18 L.Ed. 2d 471, this Court recently stated with respect to the entry of judgment notwithstanding the verdict (386 U.S., p. 321):

> "This procedure is consistent with decisions of this Court rendered prior to the adoption of the Federal Rules in 1938. Compare Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 55 S.Ct. 890; 79 L.Ed. 1636, with Slocum v. New York Life Ins. Co., 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879, and Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177. *And it is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial.* Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147." (Emphasis added)

Petitioners have placed heavy reliance on the bitterly criticized case of *Slocum* v. *New York Life Ins. Co.*, 228

U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879 (1912). The *Slocum* case, however, has been completely eroded, if not *sub silentio* overruled by more recent holdings of this Court.

In *Montgomery Ward & Co.* v. *Duncan*, 61 S.Ct. 189, 311 U.S. 243, 85 L.Ed. 147 (1940), this Court stated (311 U.S., p. 250):

> "The Rule [50b] was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It does not alter the right of either party to have a question of law reserved upon the decision of which the court might enter judgment for one party in spite of a verdict in favor of the other. Prior to the adoption of the rule, in order to accomplish this it was necessary for the court to reserve the question of law raised by a motion to direct a verdict. The practice was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution."

In *Berry* v. *U.S.*, 312 U.S. 450, 61 S. Ct. 637 (1941), this Court stated with reference to Rule 50(b) (312 U.S., p. 452):

> "But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law."

Finally, in *Galloway* v. *U.S.*, 63 S. Ct. 1077, 319 U.S. 372, 87 L.Ed. 2d 1458, rehearing denied 63 S. Ct. 1443, 320 U.S. 214, 87 L.Ed. 1851 (1943), it was stated with respect to the power of a trial judge to remove a case from the jury (389 U.S., p. 1086):

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; Berry v. United States, 312 U.S. 450, 61 S. Ct. 637, 85 L.Ed. 945. The objection therefore comes too late."

See also *Lyon* v. *Mutual Benefit Association*, 59 S. Ct. 297, 305 U.S. 484, 83 L.Ed. 303, rehearing denied 59 S. Ct. 459, 306 U.S. 667, 83 L.Ed. 1062 (1939); *Coughran* v. *Bigelow*, 17 S.Ct. 117, 164 U.S. 308, 41 L.Ed. 442 (1896); *Cox* v. *City of Freeman, Missouri*, 321 F.2d 887 (C.A. Mo. 1963); Wright & Miller, *Federal Practice & Procedure*, sec. 2522, p. 538; 5A *Moore's Federal Practice*, sec. 50.07(1), p. 2351.

It is well established that the direction of a verdict (or entry of a judgment notwithstanding the verdict) is not an infringement of the right to a jury trial where the question is one of law. *Whitsell* v. *Alexander*, 229 F. 2d 47 (C.A. Ill. 1956) cert. denied 76 S.Ct. 788, 351 U.S. 932, 100 L.Ed. 1461. "Trial by jury" means a trial by twelve men under supervision of the judge empowered to instruct and advise them and to set aside the verdict, if against the law or evidence. *Howard* v. *L.A. & A. Railway Co.*, 49 F.2d 571 (C.A. Louisiana 1931). As noted by this Court in *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1935), (295 U.S., p 657):

> "The aim of the amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."

In the instant case, the question of whether sufficient evidence existed to establish consideration for the alleged post-contract promises was a *question of law* for the trial court and part of its historic function of determining questions of law. The right to a jury trial is protected by providing a uniform rule to be used in the exercise of the power of the trial judge to remove cases from the court's decision. *Helene Curtis Industries, Inc.* v. *Pruitt,* 385 F.2d 841 (C.A. Tex. 1967), cert. denied 88 S.Ct. 1806, 391 U.S. 913, 20 L.Ed. 652.

Petitioners have not pointed to any portion of the record to support their contention that consideration was in fact present and allege that the trial court did not make any finding in this regard. The trial court did say, however:

> "... there was no legally sufficient evidence for the jury to find that the alleged oral statements relating to substantial road travel and substantial advertising and promotion imposed a contractual obligation on the defendants."

Petitioners also question the finding of the Court of Appeals for the Sixth Ciricuit that consideration did not exist and assert that the court had no power to make such a determination in the absence of a finding by the trial judge. Even assuming *arguendo* that the issue of lack of consideration was not determined by the trial court, petitioners' argument ignores the well recognized principle that an appellee may defend a judgment on any ground consistent with the record, even if rejected in the lower court. *Helvering* v. *Gowran,* 58 S.Ct. 154, 158, 302 U.S. 239, 245, 82 L.Ed. 2d 224 (1937).

In summary, the constitutional right to a jury trial was not impaired either by the trial court or the Court of Appeals for the Sixth Circuit.

II.

JURISDICTION OF THIS COURT TO REVIEW BY CERTIORARI DOES NOT EXTEND TO CASES INVOLVING THE PROPRIETY OF NOT SUBMITTING ISSUES FOR THE JURY'S CONSIDERATION.

This Court has often stated that jurisdiction to review by certiorari should be sparingly exercised, and only in cases of peculiar gravity and general importance to the public. *Ex Parte Lau Ow Ben,* 12 S.Ct. 45, 141 U.S. 583, 35 L.Ed. 868 (1891). It is not granted to determine questions of the sufficiency or insufficiency of evidence presented to the trial court since this depends essentially upon consideration of the evidence. *Houston Oil Co.* v. *Goodrich,* 38 S. Ct. 140, 245 U.S. 440, 62 L.Ed. 385 (1918).

In *Dick* v. *New York Life Insurance Co.,* 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed. 2d 935, Justice Frankfurter stated (p. 455):

> "If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence. Chief Judge Magruder has expressed the common sense of the matter:
>
> "If an appellate court is of the view that the trial judge made an error of judgment in with-

> drawing a case from the jury, or in entering judgment for the defendant notwithstanding a plaintiff's verdict, a reversal [by a Court of Appeals] is no doubt called for; but we cannot see that anything is gained by blowing up that error of judgment into a denial of the constitutional right to a jury trial as guaranteed by the Seventh Amendment'."

Finally, in *Manaia* v. *Potomac Electric Power Co.*, (C.A. Md. 1959) 268 F.2d 793, cert. denied 80 S.Ct. 255, 361 U.S. 913, 4 L.Ed. 2d 183, where the argument was also made that the entry of judgment n.o.v. is violative of Seventh Amendment rights, it is stated (p. 798-799):

> ". . . no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. * * * [I]ts employment within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury."

* * *

> "The contention does not question the established principles; it merely seeks an obscuring injection of the linguistics of constitutional principles into the familiar process of appraisal of evidence and its associated inferences.
>
> "Where a court indifferent to the established basis upon which powers have been allocated between the court and jury are beguiled into rejection of every view which seemed to it less reasonable than its own, a violation of constitutional right might well be said to have occurred. . . . The attempt . . . to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this."

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the Petition for Writ of Certiorari filed by Geneva Ruffin, Delores Gates, Elaine Porter, and Betty Rodgers should be denied.

Respectfully submitted,

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